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No. 08-768

Supreme Court, U.S.
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In The

Supreme Court of the United States

BASHAS', INC.,

Petitioner,

v.

JOSE PARRA, GONZALO ESTRADA and AURELIA MARTINEZ,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the Court of Appeals required to remand for clarification – rather than review – an interlocutory class certification order where the district court's reasoning was explained in its original order and reaffirmed in its order denying reconsideration?

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STATEMENT OF THE CASE

This class action alleges that Petitioner Bashas' Inc., a grocery retailer, discriminates against the Hispanic hourly workers employed in its Food City stores. Respondents, Plaintiffs below, contend, on behalf of themselves and similarly situated workers, that they have been paid lower wages and been afforded poorer working conditions than their predominantly white counterparts at Petitioner's other grocery stores, operated under the trade names Bashas' and A.J.'s Fine Foods. Plaintiffs assert that their employer has discriminated against them based upon their national origin in violation of Title VII of the 1964 Civil Rights Act as amended (42 U.S.C. § 2000e et seq.) and 42 U.S.C. § 1981. While Plaintiffs make claims for both disparate pay and disparate working conditions, this appeal concerns only the decision by the district court not to certify the pay discrimination claim.

The facts concerning Bashas' stores and its pay policy are summarized in the opinion below.[1] Pet. App. A at 2a-3a. Bashas' operates 150 grocery stores under three different trade names: Food City, Bashas' and A.J.'s Fine Foods ("A.J.'s"). *Id.* The Food City stores are mostly staffed with Hispanic workers

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[1] The Petition contains a three-page discussion entitled "Factual Background." Pet. at 4-6. These factual assertions are not supported by citations to the record or the opinions below, and instead are Petitioner's version of the facts, which Plaintiffs dispute.

(75%), while Bashas' and A.J.'s Fine Foods employ only a small percentage of Hispanic workers (15%). *Id.*

Bashas' uses a written pay scale to set the pay rate for workers in each hourly position. Pet. App. C at 58a. Bashas' has a different written pay scale for each of the three store formats. *Id.* Until at least 2003, the pay scale for Food City workers was lower than the pay scale for the Bashas' and A.J.'s workers. Pet. App. A at 3a. The disparity between the wages of a Food City worker and a comparable worker assigned to the same job in a Bashas' or A.J.'s store ranged from $300 to $6000 per year. *Id.* These pay disparities resulted in the predominantly Hispanic Food City employees receiving less pay than their counterparts at Bashas' and A.J.'s. *Id.*

In 2001, Bashas' began to bring the pay scale for the Food City stores in line with the pay scales for the other two trade named stores, increasing some pay steps for some job positions. In April 2002, when Plaintiffs filed the complaint in this action, there were 2200 Hispanic Food City workers receiving lower pay rates than their counterparts. Pet. App. B at 18a. By 2003, the pay scales had reached greater parity but there were still 700 Hispanic workers being paid based upon lower pay rates than similarly situated employees at Bashas' and A.J.'s. *Id.* at 18a-19a. As described below, this gradual merger of the pay scales, between the time the case was filed and the time that the class certification motion was

heard, was central to the district court's denial of class certification.

On August 29, 2005, the district court certified a class of Food City hourly workers challenging disparate working conditions, but declined to certify the unequal pay claim.[2] Pet. App. C at 75a. With respect to the pay discrimination claim, the district court concluded that defendant used a common pay policy. "Defendant's system for compensating hourly employees is similar across all stores. . . ." *Id.* at 58a. The court also found that it was undisputed that past pay schedules for Food City "contained lower pay ranges than those utilized at Bashas' and A.J.'s stores." *Id.* These findings should have been sufficient to satisfy Rule 23(a)(2)'s requirement of a common question of law or fact. *See* Fed. R. Civ. P. 23(a)(2). But, the court concluded that because the pay scales were "now almost identical," Pet. App. C at 60a, Rule 23(a) commonality was lacking among class members:

> [B]oth parties concede that over the past several years the contested pay scales have merged and, for the most part, are now identical. Consequently, some class members may now receive pay that is equal to that of their counterparts in Defendant's other stores, while other class members may not. Thus,

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[2] The Petition omits that Plaintiffs have also challenged discriminatory working conditions for Hispanic Food City workers and that the district court certified that claim as a class action. Pet. at 7.

> although Defendant's system for compensating hourly employees is similar across all stores, the Court is not satisfied that the manner in which the system affects the class raises issues that are common to all class members.

Id. at 58a (internal citations omitted).

Plaintiffs filed a motion requesting that the court reconsider its order on the unequal pay claim and, alternatively, asked the court to certify a more limited class, covering *only* those Food City employees who were actually paid a rate lower than that for comparable Bashas'/A.J.'s workers. Pet. App. B at 15a. Plaintiffs explained that, under settled Ninth Circuit law, they could establish Rule 23(a)(2) commonality without showing that every Food City employee was similarly affected by the pay policy and for the entirety of the class period. *See id.* at 18a.

On March 30, 2006, the district court denied the reconsideration motion. Pet. App. B. Of critical importance for this Petition, the district court did not expand, clarify or alter the reasoning for its original order denying certification of the pay claim. *See id.*

The Ninth Circuit granted permission to appeal and reversed in a unanimous decision. Pet. App. A. The panel held that the district court "failed to consider the evidence of past pay disparities and discrimination common to the Hispanic workers at Food City." *Id.* at 9a. It concluded, based upon the district court's findings, that commonality was established.

The panel remanded for consideration of the remaining Rule 23 factors, which the district court had not yet addressed for the pay claim. *Id.* at 10a.

Bashas' then filed a petition for panel rehearing and for rehearing *en banc*, which was denied. Pet. App. D at 77a-78a. No judge requested a vote on whether to rehear the matter *en banc*. *Id.*

REASONS FOR DENYING THE WRIT

The Writ Should Be Denied Because the Unanimous Interlocutory Order Below Creates No Circuit Conflict

The Petition presents no conflict among the circuit courts nor even an important legal issue. The Petition does not dispute that the Ninth Circuit panel applied the appropriate legal standard for determining whether a putative class action satisfies Rule 23(a)(2). For these reasons alone, the Petition should be denied.

The Writ Should Be Denied Because Review of the Interlocutory Class Certification Order Would Be Premature

An additional reason to deny the writ is that the order is interlocutory and the final outcome of the case is far from certain. *See Virginia Military Inst. v. United States,* 508 U.S. 946, 946 (1993) (Scalia, J., concurring in the denial of the petition for writ of

certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). The Ninth Circuit's order remands the certification motion to the district court for it to determine, in the first instance, the remaining factors of the Rule 23 analysis for the pay discrimination claim. Assuming that the district court decides that class certification is appropriate under Rule 23, the case must still be tried and, in the event of a liability finding, there may be additional proceedings to determine appropriate remedies. *See Int'l Brotherhood of Teamsters v. United States,* 431 U.S. 324, 360-61 (1977). As there is no way to predict the outcome of these additional and complex stages of litigation, certiorari review now would be potentially wasteful and unnecessary.

Petitioner urges this Court to grant certiorari because it contends that the Ninth Circuit's ruling may "affect the outcome of this case." Pet. at 16-18. This argument, of course, ignores that Bashas' will have the right to appeal the judgment in the event that it is found liable. More importantly, Petitioner's claim is an argument for intermediate appellate scrutiny, not for Supreme Court review. Rule 23 was amended in 1998 to add subsection (f), which permits interlocutory appellate review of class certification decisions. Fed. R. Civ. P. 23(f). It is the function of the appellate courts to exercise their discretion to ensure that class actions do not proceed to trial based upon erroneous class certification decisions. Petitioner has failed to demonstrate that its speculative concern

justifies the extraordinary remedy of a grant of certiorari.

The Writ Should Be Denied Because the Court of Appeals Committed No Procedural Error, Much Less an Error Justifying Certiorari Review

Bashas' seeks certiorari not to answer any legal question, but to correct an alleged procedural error. It argues that the district court's class certification order was ambiguous and, as such, the Ninth Circuit was obligated to remand the order for clarification, rather than review it for error. Petitioner grounds its argument for mandatory remand in this Court's decision in *Sprint/United Management v. Mendelsohn*, ___ U.S. ___, 128 S. Ct. 1140 (2008). The holding in *Sprint/United* was far narrower than Petitioner's reading but, in any event, would not apply here because the district court's order was not ambiguous. Petitioner thus fails to present a compelling reason for granting a writ of certiorari.[3]

The *Sprint/United* decision addressed the proper role of an appellate court in reviewing a trial court's evidentiary rulings. At issue in *Sprint/United*, an age

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[3] Whenever an appellate court is called upon to review an exercise of discretion by the district court, the review will necessarily involve some degree of judgment or interpretation of the district court's reasoning. This Court does not sit to second-guess those fact-bound determinations.

discrimination case, was a two-sentence minute order in which the district court excluded evidence of discrimination by other supervisors against other employees. *Sprint/United,* 128 S. Ct. at 1143-44. The minute order did not explain the basis for the ruling. *Id.* at 1144. The Tenth Circuit concluded that the district court had erroneously applied a *per se* rule that such evidence was inadmissible, and reversed. *Id.* This Court disagreed, holding that the minute order was ambiguous and that the appellate court should have remanded for clarification, rather than assume the district court applied an incorrect legal rule. *Id.* at 1146. Reaffirming the importance of deference to lower court rulings on evidentiary issues, this Court instructed that "[w]hen a district court's language is ambiguous, . . . [a] remand directing the district court to clarify its order is generally permissible. . . ." *Id.*

In contrast to the cryptic two-sentence order in *Sprint/United,* this case involves two separate district court orders, totaling 59 pages, in which the district court fully explained its decision to deny certification of the pay claim. *See* Pet. App. B & C. In the critical passage, the district court found that the merger of the pay scales defeated a finding of Rule 23(a) commonality because "some class members may now receive pay that is equal to that of their counterparts in Defendant's other stores, while other class members may not." Pet. App. C at 58a. Its rationale is unambiguous: "Thus, although Defendant's system for compensating hourly employees is similar across

all stores, the Court is not satisfied that the manner in which the system affects the class raises issues that are common to all class members." *Id.*

The district court's meaning was reaffirmed four paragraphs later when it addressed the fact that Bashas' had conceded the bulk of Plaintiffs' statistical evidence. "[T]hese concessions alone do not indicate commonality among all the class members, as Defendant's pay scales, implemented at Food City and Bashas' stores, are now almost identical." *Id.* at 60a. The court's erroneous reading of Rule 23(a)(2) is, thus, manifest.

Any conceivable doubt about the rationale for the district court's ruling was eliminated by Plaintiffs' subsequent motion for reconsideration. Plaintiffs' briefing explained why the district court's application of Rule 23(a)(2) was flawed. The district court nonetheless reaffirmed its prior ruling without any change to its conclusion or reasoning. Pet. App. B at 15a-20a.[4]

Despite the clear language of the district court's orders, Petitioner contends that there is a "plausible" alternative reading of the order, i.e. that individualized issues defeated commonality. Pet. at 13. In fact,

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[4] The Petition quotes language from the reconsideration order suggesting that the district court understood that the merger of the pay scales would not defeat commonality. Pet. at 11. The citation is misleading because, in this portion of the ruling, the district court was summarizing *Plaintiffs' contentions*, which it did not accept. Pet. App. B at 18a.

both the district court and the Court of Appeals *expressly addressed and rejected* this argument as a basis for finding that commonality was not satisfied. The district court concluded that these issues went to the merits of the pay claims, rather than to the Rule 23 requirements. Pet. App. C at 61a n.29. The Court of Appeals found that "[t]he claimed difficulties in the calculations of damages, as they affected the various class members, do not preclude class certification." Pet. App. A at 10a.

Finally, the panel did not err when it determined, based on the extensive factual record before it, that commonality had been satisfied. For this conclusion, it engaged in no *de novo* fact finding but simply relied on the district court's own substantial factual findings about the pay claim. Pet. App. A at 8a-10a. Those findings included that:

1) "all of Defendant's stores use company-established pay schedules to determine rates of pay," Pet. App C. at 58a;

2) pay schedules for Food City stores "contained lower pay ranges than those utilized at Bashas' and A.J.'s stores," *id.*;

3) "Defendant's system for compensating hourly employees is similar across all stores," *id.*;

4) "Food City Stores have a higher percentage of Hispanic employees compared to Bashas' or A.J.'s stores", *id.* at 60a; and

5) Hispanic employee hourly rates were lower in similar jobs, *id.*

These findings were an ample predicate for a determination that the Plaintiffs had raised a common question of law or fact. Fed. R. Civ. P. 23(a)(2). The panel correctly remanded the *remaining* elements of Rule 23 which the district court had not yet evaluated. Pet. App. A at 10a.

CONCLUSION

For all of these reasons, the petition for certiorari should be denied.

Respectfully submitted,

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